RECOVERY OF SALARY BY A DE FACTO OFFICER.

II.

Can the rule allowing one *de facto* in office to recover the salary thereof derive any support from the basis of the title or right which a *de jure* officer has to the salary of the office which he occupies? In order to answer this question it will be necessary to inquire into the basis of a *de jure* officer's right to salary. Various theories have been advanced as to the basis of such a right. The oldest hypothesis is that of the property right. BLACKSTONE, in his COMMENTARIES, classifies office, which he defines to be "the right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging," as an incorporeal hereditament.[26] And it is there said that "a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only; save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for they might perhaps vest in executors or administrators." This is distinctly an English theory, based on the English conception of an office which is held under a grant from the Crown. Offices in this country are created by statute or constitution, for the benefit of the public, the authority of the incumbents to perform the functions and to discharge the duties thereof being conferred on, or delegated to, them by commission. With these characteristics of an office in view, the courts of this country, with a few exceptions, have refused to adopt the theory of absolute property right in office or the salary thereof.[27]

Courts have sometimes spoken of the rendition of services as the basis of an officer's right to salary.[28] In few, if any, jurisdictions has this principle been consistently and logically applied. It has been held repeatedly that where there have been two claimants of an office and one of these has performed the duties thereof and received installments of salary from the State or municipality, if the other is

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[26] 2 Blackstone's Comm. 36.

[27] State v. Henderson (1910), 145 Iowa 657, 124 N. W. 767; State v. Hawkins (1886), 44 Ohio St. 98, 109; Taylor and Marshall v. Beckham (1900), 178 U. S. 548; Nichols v. McLean (1886), 101 N. Y. 526; Donahue v. Will County (1881), 100 Ill. 94; Contra: see Hoke v. Henderson (1833), 15 N. Car. 1. This case was expressly overruled in the case of Mial v. Ellington (1903), 134 N. Car. 131, which brings North Carolina into line with the rest of the States holding there is no property right in an office. —

[28] Smith v. Mayor (1868), 37 N. Y. 518; Conner v. Mayor, etc. of New York (1857), 5 N. Y. 285; McVeany v. Mayor (1880), 80 N. Y. 185; Gorman v. Commissioners (1877), 1 Idaho 655; Stuhr v. Curran (1882), 44 N. J. L. 181; Peterson v. Benson (Utah, 1910), 112 Pac. 801; Erwin v. Jersey City (1897), 60 N. J. L. 141.

finally declared to be the *de jure* officer, he may recover from the former the salary which such claimant has received.[29] This rule is supported even by the courts of some of the States where the *de facto* officer is allowed to recover the salary of the office to which there is no other claimant.[30] It is also a rule generally adhered to that the *de jure* claimant may recover the salary of the office from the State or municipality, where the duties of the office have been performed by one *de facto* in office to whom the salary has not been paid.[31] Where a *de jure* officer has been improperly suspended or removed, it is held he may recover the salary for the period while out of office,[32] even though the duties have been performed by another who has been appointed and paid in his stead.[33] Other generally well recognized rules of the same sort might be mentioned, but these will suffice to illustrate our position. Not a single one of these decisions is consistent with the theory of service as the basis of an officer's right to the salary of his office. One class of cases, at first glance, seem to lend support to this theory—these are the cases which deny to the *de jure* officer the right to recover from the State or municipality any installments of salary paid to the person *de facto* in the office.[34] This is the general, though not universal,[35] rule. The courts which do uphold this rule give as a reason therefor, not that the officer has performed the duties of the office, but that this is a proper case for the application of the *de facto* doctrine, as it would result in a definite injury to the public service to require

[29] Coughlin v. McElroy (1902), 74 Conn. 397, 50 Atl. 1025; Sandoval v. Albright (1908), 14 N. Mex. 345, 93 Pac. 717; Sutliffe v. New York (1909), 132 App. Div. 831, 117 N. Y. S. 813; Grant v. New York (1906), 111 App. Div. 160, 98 N. Y. S. 685; Nall v. Coulter (1904), 25 Ky. L. R. 1891, 78 S. W. 1110; Nichols v. McLean (1886), 101 N. Y. 526.

[30] Tanner v. Edwards (1906), 31 Utah 80, 86 Pac. 765. (This case even allows a recovery from the state where the salary has been paid to the de facto officer.) See also Behan v. Davis, supra, in which case the implication is that the de jure officer could recover from the de facto officer the salary paid him. See also Shaw v. County of Pima (1888), 2 Ariz. 399, 18 Pac. 273.

[31] Dolan v. Mayor (1877), 68 N. Y. 274; State ex rel. Chapman v. Walbridge (1899), 153 Mo. 194.

[32] Bullis v. Chicago (1908), 235 Ill. 472, 85 N. E. 614.

[33] Gracey v. City of St. Louis (1908), 213 Mo. 384, 111 S. W. 1159.

[34] State v. Babcock (1904), 106 Mo. App. 72, 80 S. W. 45; City of New York v. Voorhis (1911), 129 N. Y. S. 832; Dolan v. Mayor (1877), 68 N. Y. 274; State ex rel. Cronin v. Eshelby (1886), 5 Ohio Cir. Dec. 592; Coughlin v. McElroy (1902), 74 Conn. 397, 50 Atl. 1025; Gorman v. Commissioners (1877), 1 Idaho 655; Board of County Commissioners v. Rhode (1907), 41 Colo. 258, 95 Pac. 551; Stuhr v. Curran (1882), 44 N. J. L. 181.

[35] People v. Smyth (1865), 28 Cal. 21. And see Rasmussen v. Commissioners (1899), 8 Wyo. 277, 56 Pac. 1098, and Blydenburgh v. Commissioners (1899), 8 Wyo. 303, 56 Pac. 1106.

the disbursing officer to inquire into and determine, at his peril, whether the person performing the duties of the office is the officer *de jure* before making payment to him of any part of the salary of the office. This rule, it is argued and not without considerable force, if insisted upon would generally result in a refusal by the disbursing officers to pay any salary to the one performing the duties of the office until the courts pass on his title to the office and find him to be the officer *de jure*. Judge ANDREWS, in the case of *Dolan* v. *Mayor*,[36] said, "It is plain that in many cases the duty imposed upon the fiscal officers of the State, counties or cities to pay official salaries, could not be safely performed unless they are justified in acting upon the apparent title of claimants. * * * If fiscal officers, upon whom is imposed the duty of paying official salaries, are only justified in paying them to the officer *de jure*, they must act at the peril of being held accountable in case it turns out that the *de facto* officer has not the true title; or, if they are not made responsible, the department of the government they represent is exposed to the danger of being compelled to pay the salary a second time. It would be unreasonable, we think, to require them, before making payment, to go behind the commission and investigate and ascertain the legal right and title. This, in many cases, as we have said would be impracticable. * * * If, on a controversy arising as to the right of an officer in possession, and upon notice that another claims the office, the public authorities could not pay the salary and compensation of the office to the *de facto* officer, except at the peril of paying it a second time, if the title of the contestant should subsequently be established, it is easy to see that the public service would be greatly embarrassed and its efficiency impaired. Disbursing officers would not pay the salary until the contest was determined, and this, in many cases, would interfere with the discharge of official functions."

The courts of no State except New Jersey have been consistent in the application of the principle of service as the basis of an officer's claim for salary. In this jurisdiction the *de jure* officer has been refused the right to recover from the person *de facto* in office the fees of the office received by the latter while in possession and in the execution of the duties thereof.[37] This, however, is against the great weight of authority;[38] and, we believe, there can be found in the law of officers no great support for the theory that service is the basis

[36] 68 N. Y. 274, 280-1.

[37] Stuhr v. Curran, supra.

[38] See cases cited under note No. 29.

of the officer's right to salary.[39] Finally, contract is not the basis of the right to salary.[40]

If we concede, as it seems we must, the correctness of the general principles above stated, we have limited considerably our field of inquiry. But the question, what is the basis of the officer's right to salary, is still unanswered. It is, indeed, one of those inquiries which are easier answered by the eliminating process than by stating affirmatively the answer sought. Courts have made various general statements respecting the basis of this right. It has been said, "The legal right to the office carried [carries] with it the right to the salary or emoluments of the office,"[41] and, "The commissions or fees provided by law were [are] incident to, and as clearly connected with, the office as the rents of real estate or interest on securities."[42] Again it has been said "The salary is incident to the title to the office and not to its occupation and exercise,"[43] and, "The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office."[44] Perhaps the clearest statement of this sort is that made by Justice BRACE in the case of *State* v. *Walbridge*,[45] where he said, "The right of a public officer to the salary of his office is a right created by law, is incident to the office and not the creature of contract nor dependent upon the fact or value of services actually rendered." Even this statement does not give as clear and definite notion of the right as the reader may wish. Undoubtedly the courts mean to say that it is a right given by statute to the *de jure* office, the intent of the legislature being that the salary should go to the rightful claimant of the office so long as the office exists and the statutory provision as to a salary remains unchanged by any subsequent statute. In other words, the right is in the nature of a qualified property right. As respects anyone except the State or munici-

[39] See O'Brien v. City of St. Paul (1898), 72 Minn. 256; and Philadelphia v. Given (1869), 60 Pa. St. 136, holding that the right to salary is not a quantum meruit for services performed in office. See also the case of State ex rel. v. Walbridge (1899), 153 Mo. 195, 54 S. W. 447, where it is said, "The right of a public officer to the salary of his office is a right created by law, is incident to the office and not the creature of contract nor dependent upon the fact or value of services actually rendered." See further Gracey v. City of St. Louis, supra.

[40] State ex rel. v. Walbridge, supra; Fitzsimmons v. Brooklyn (1886), 102 N. Y. 536; Stubenville v. Culp (1882), 38 Ohio St. 18; Butler v. Pennsylvania (1850), 10 How. (U. S.) 402; Koontz v. Franklin County (1874), 76 Pa. St. 154; Farwell v. Rockland (1872), 62 Me. 296; Wyandotte v. Drennan (1881), 46 Mich. 478; Coffin v. State (1885), 7 Ind. 157; State v. Kalb (1880), 50 Wis. 178.

[41] Andrews v. Portland (1887), 79 Me. 484; Chicago v. Luthardt (1901), 191 Ill. 516.

[42] Graves v. Bullen (1909), 53 Tex. Civ. App. 261, 115 S. W. 1177.

[43] Bullis v. Chicago, supra; Philadelphia v. Given, supra.

[44] Sheridan v. St. Louis (1904), 183 Mo. 25; Burke v. Edgar (1885), 67 Cal. 182; Dolan v. Mayor, supra; People ex rel. Morton v. Tieman (1859), 30 Barb. 193.

[45] Supra, see page 203 of the report.

pality, *i. e.,* the public, his claim to the office and the salary is enforceable; but he has not such a right as will hinder the legislature from abolishing the office during his tenure, or changing the compensation, or the duties attached to the office, unless such action by the legislature is forbidden or limited by the constitution. Even the legislature, however, cannot legislate the officer out of office without abolishing the office,[46] not even by abolishing it by name and creating another office under a different name to which are attached practically all of the duties of the old office.[47] This being the nature of the right, there is nothing in it on which to base the claim of the person *de facto* in office to the salary thereof, though there is no other claimant. The person *de facto* in office has no sort of title to the office, and, granting the legislative intent to be as above expressed, the statute attaching a salary to the office does not give such an incumbent any claim thereto.

What, if any, reason is there for awarding the salary of the office to the *de facto* incumbent? This question is best answered by considering the reasons which the courts have offered for so holding. The New Jersey cases, as has been said,[48] rely on services performed as the basis of recovery. In the cases in other States the courts have allowed the recovery on the basis of equitable right, *i. e.,* the State or municipality having received the service should pay for the same and there being no other person except the one *de facto* in office who has any right in law or equity to claim the compensation, the *de facto* officer who has in good faith performed the duties of the office is entitled thereto. In the case of *Peterson* v. *Benson,*[49] which is one of the best of those cases allowing the person *de facto* in office to recover the salary thereof, Justice McCARTY said, "We think the rule as declared by these authorities (*i. e.,* allowing a recovery by the *de facto* officer) is more in consonance with the principles of equity than the opposite rule, which holds that an officer *de facto* cannot, under any circumstances, maintain an action for the salary, fees, or other compensation attached to the office which he holds." This quotation seems to warrant the assumption that the intent of the Justice was to rest the right to recover on equitable grounds. This is in conflict with a statement occurring earlier in the opinion, to which in

[46] Malone v. Williams (1907), 118 Tenn. 390; State v. Leonard (1887), 86 Tenn. 485, 7 S. W. 453; People v. McAllister, (1894), 10 Utah 357, 37 Pac. 578; Pratt v. Board (1897), 15 Utah 1, 49 Pac. 747; Adams v. Roberts (1904), 119 Ky. 364, 83 S. W. 1035; State v. Wiltz (1856), 11 La. Ann. 439.

[47] Malone v. Williams, supra.

[48] See page 179 of this article.

[49] Supra.

a former quotation we have called attention by the use of italics,[50] in which the Justice says that the decisions allowing the recovery of salary by the *de facto* officer do so on the ground that the *de facto* officer "is legally entitled to the emoluments of the office."

The earliest decided case in which recovery was allowed was that of *Behan* v. *Davis*.[51] The Arizona court in that case admits "that as between an officer *de facto* and one *de jure*, notwithstanding the *de facto* officer may have performed all the duties of the office, the *de jure* officer is entitled to the legal compensation" and then goes on to say that the case at bar is different because in this case "there is no dispute as to the title to the office; no adverse contestant for it" and, without considering the question whether the differentiating facts call for a different rule, allows mandamus to issue to compel the auditing of the claim. The reason given in this case for the rule refusing recovery of salary to the *de facto* officer when there is a *de jure* claimant is that to adopt a contrary rule would encourage usurpation of office. If we accept this reason as the proper one, it does permit of a distinction between cases where there are *de jure* claimants and those where there are none. But the reason usually offered for refusing recovery to the person de *facto* in office, even where there is another claimant, is that in an action for salary the person *de facto* in office can show no title to the salary, no qualified property right therein, and this is as true where there is no claimant as where there is. In the recent case of *Elledge* v. *Wharton*,[52] the South Carolina court thinks "it not only just, but consonant with sound law to hold" the *de facto* officers, who are *de facto* because of defective appointments, where there are no *de jure* claimants, entitled to the salaries of the offices whose duties they have performed. These are as satisfactory reasons as have been given by the courts for allowing the one *de facto* in office to recover.

An attempt has been made in this article to show that there is no basis in either the *de facto* doctrine or the legal right which a *de jure* officer has to the salary of his office for the recovery of salary by the *de facto* officer. What other legal right can there be upon which the *de facto* officer can base his claim? We can find none and none of the authorities suggest any. If it is true that there is no legal basis, is there no basis in equity for the recovery? In considering this question, it should be remembered that the actions to recover salary are in two forms, either mandamus directed to the disbursing officers or an action in the form of a contract action by the

[50] See page 298 of this article.
[51] Supra.
[52] Supra.

claimant against the State or municipality. These are both in form and nature actions at law and hence equitable principles are not properly applied to them. But granting, for the sake of argument, that they may be employed, what equitable principles are there which may be invoked to aid recovery in the case at hand? "Equity" is sometimes spoken of as synonymous with natural right and justice; but courts of equity, as well as courts of law, do not afford relief in a case because to deny it would be repugnant to one's sense of natural right and justice. And a recovery in a court of law or equity is allowed on the ground that it is "equitable" only when such a holding is supported by some one of the established rules of equity.[53] No matter what the history of the development of equitable jurisdiction may have been, that jurisdiction is now fixed, and it is only when a case falls within its rules that equity will aid the injured or oppressed complainant. So let us inquire, what equitable principle will aid the *de facto* officer in recovering his salary? The only equitable doctrine which occurs to the writer as at all warranting a recovery of salary by the *de facto* officer is the doctrine of unjust enrichment so frequently applied in actions in quasi-contract. Conceding for the moment that this principle should be applied in the sort of cases under discussion, it has in no case with which we are acquainted been properly applied—for if this principle is to direct the recovery certainly the amount recovered should be measured by the value of the services rendered by which the State is enriched rather than by the salary which the statute allows to the *de jure* officer. But is not the principle itself opposed to the spirit of the law of public officers and of public law in general? Is it not the intent of the legislature in creating an office and affixing a salary thereto that only the officer regularly appointed or elected and properly qualified shall be allowed to perform the duties thereof and receive compensation therefor? If this question be answered affirmatively, it does not seem proper for the courts to allow this intention to be defeated by allowing another person, as the officer *de facto,* to recover compensation for the service rendered simply because some officer has failed to do his duty in respect to issuing a commission to the *de facto* officer or in respect to having him removed by proper proceedings, or because the public, usually without any knowledge of the facts has dealt with and regarded him as the officer *de jure.* As to the hardship, imposed on the person *de facto* in office, of refusing him the salary after he has in good faith performed the duties of the office, is it greater in this case than in others in the law of officers where the courts uniformly

[53] See Bispham's Principles of Equity, sec. 1.

hold that the claimant cannot recover? It is undisputed that even though a *de jure* officer has faithfully performed the duties of his office he cannot recover in implied assumpsit for the value of his services unless the right to salary is expressly given him by statute or ordinance.[54] In such cases the officer will receive no compensation unless the legislature see fit to subsequently reward him for his time and labor. The basis of this rule is that the officer is deemed to have "accepted his office with knowledge of and with reference to the provisions of the charter or incorporating statute relating to the services which they may be called upon to render, and the compensation provided therefor."[55] Is it any more of a hardship or any more repugnant to our sense of right and justice to charge the one who seeks to hold office with the knowledge that he must receive it in the proper way, through the proper channels, and that all of the statutory requirements must be complied with before he can be an officer *de jure* and entitled to compensation for the services which he renders than to charge the *de jure* officer with the knowledge that there is no compensation attached to the office, as above stated? We believe not, and we think the *de facto* officer should not be allowed to recover on the theory suggested because we believe to allow him to do so would be a plain disregard by the courts of the legislative intent in the creation of offices and would amount to putting the official sanction on a plain evasion of the statutes.

It not infrequently happens that courts in their desire to grant relief in cases in which their natural sense of right and justice inclines them to aid the plaintiff adopt principles which are inconsistent with the general principles governing other cases of the same class. As the result of such action, the way is frequently opened to infinitely more injury and hardship than would have resulted had the particular case been decided according to the generally accepted principles of the law. It appears to the writer that the courts which have allowed the *de facto* officer to recover the salary of the office where there is no other claimant have made this mistake. The rule introduces confusion and contradiction into the law of officers and no one can predict with any degree of accuracy the number of unfair and unjust decisions that may result therefrom.

It is true that where one in good faith has performed the duties of an office without being the *de jure* officer because of some defect

[54] White v. Inhabitants of Levant (1887), 78 Me. 568; Doolan v. Manitowoc (1879), 48 Wis. 312; Brazil v. McBride (1879), 69 Ind. 244; Fernald v. Dover (1899), 70 N. H. 42; Perry v. Cheboygan (1884), 55 Mich. 250; Sikes v. Hatfield (1859), 13 Gray (Mass.) 347.

[55] 1 Dillon, Municipal Corporations (5th Ed.) p. 732, sec. 432, old sec. 230.

in appointment, election, or qualification, it is a hardship to be denied any compensation therefor. The remedy in such a case, however, lies not in a resort to the courts but in an appeal to the legislature to compensate the injured person by special act.[56] If the legislature in any instance fails in the performance of its duty and refuses to compensate the *de facto* officer in a case where he should receive compensation, the fault lies with it, and it is not the province of the court to undertake the performance of this duty of the legislature in order to prevent a hardship to the individual. And if it is deemed the part of wisdom to give the compensation in every case to the one who performs the services of the office in good faith where there is no *de jure* claimant, or where there is an election contest and another than the person who performs the services is found to be the officer *de jure*, is it not desirable that this should be accomplished by the passage of a statute rather than by judicial legislation? Statutes of this sort are, indeed, not unknown for the State of California has an act which allows one who has received the *prima facie* evidence of election to an office, where the election is contested, to recover the salary of the office during the time he serves and prior to the decision of such contest.[57]

It is to be hoped that the courts which have injected this new rule into the law of officers will see the inconsistency and illogicalness of it, and retrace their steps. If this does not happen, it is still much to be desired that they do not extend the rule of recovery to a person *de facto* in office, in good faith, but through his own fault because from lack of knowledge he has failed to comply with some one or more of the conditions precedent which the law has imposed upon him.

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[56] Romero v. United States, supra, note No. 17.

[57] See Chubbuck v. Wilson (1907), 151 Cal. 162, 90 Pac. 524.